

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNIVERSAL CITY STUDIOS, INC., :

Plaintiff, :

-against- :

NINTENDO CO. LTD. and :
NINTENDO OF AMERICA, INC., :

Defendants. :
-----X

82 Civ. 4259
(RWS)

AFFIDAVIT OF
RICHARD ZIMBERT

STATE OF CALIFORNIA)
 : ss.:
COUNTY OF LOS ANGELES)

RICHARD ZIMBERT, being duly sworn, deposes and states:

1. I am Senior Vice President and General Counsel of Paramount Pictures Corporation (hereinafter "Paramount"), a position I have held for 1 year. I have been with Paramount for over 8 years and before becoming General Counsel served as Senior Vice President and assistant to the President of Paramount Pictures Corporation and in other executive business affairs and legal capacities. I am familiar with the fact that Paramount was distributor (in the United States and Canada) of the motion picture "KING KONG," produced by Dino De Laurentiis Corp., which was a "remake" version of the original "KING KONG" motion picture. I can also attest to the fact that between 1976 and December 1979 Paramount actively promoted and used the

A001324

King Kong name and King Kong gorilla character to commercially exploit the merchandising rights it had been granted (by RKO General, Inc. and Dino De Laurentiis Corp.) in conjunction with its domestic distribution rights for the film. In this affidavit I will briefly describe Paramount's role in this commercial exploitation of "KING KONG" in the late 1970's based on (a) data and information derived from Paramount's business and legal records and (b) my own knowledge of the contractual arrangements between Paramount and Dino De Laurentiis Corp. and RKO General, Inc. through which Paramount derived the rights which led to its King Kong projects.

Background

2. In late 1974 when Dino De Laurentiis Corp. was in the very early stage of developing the project that subsequently resulted in the production of its "remake" version of "KING KONG," it and Paramount established that Paramount would be involved with that project. Dino De Laurentiis Corp. and Paramount negotiated and agreed upon the terms of Paramount's involvement and in May 1976 Paramount signed an agreement with Dino De Laurentiis Corp. dated May 20, 1976 formally consummating the arrangement. A copy of that contract, which was made effective as of February 1976, is annexed hereto as Exhibit A.

3. Shortly before we signed the foregoing distribution agreement, we also signed an agreement with Dino De Laurentiis Corp. and RKO General, Inc. under which we were granted exclusive "merchandising rights" in the name and character King Kong. This agreement (annexed as Exhibit B) gave us the right to commercially exploit the King Kong trademarks, i.e., the name King Kong and the gorilla character King Kong either by (a) using these trademarks ourselves or (b) licensing others to use them for various products and services, sales of which we believed would be stimulated by the goodwill generated by a successful motion picture. I should mention in passing that the rights we acquired from Dino De Laurentiis Corp., both to distribute the film and exploit the merchandising rights, were derivative. By this I simply mean that Dino De Laurentiis Corp. had acquired its right to produce the "KING KONG" remake and exploit the King Kong trademarks through merchandising from RKO General, Inc., producer of the original "KING KONG" film released in 1933.

Paramount's Role in the Advertising,
Promotion and Distribution of
the "KING KONG" Remake

4. Based on the records maintained by Paramount that I have reviewed in conjunction with making this affidavit, I can attest to the fact that Paramount began its advertising and

promotional campaign for "KING KONG" in late 1975, almost a year before the picture was actually released. The most significant aspect of this "pre-release" promotional activity took the form of a full-page advertisement we ran in The New York Times, New York Magazine and The Los Angeles Times, the combined circulation of which is obviously in excess of one million, in approximately November 1975. This was for a poster that showed King Kong standing on top of the twin towers of the World Trade Center building holding a woman in his left hand while fighting off an airplane attack. A photographic reduction of that poster is annexed hereto as Exhibit C, and in bold type it announces:

There is still only one KING KONG.

One year from today Paramount Pictures and Dino De Laurentiis will bring to you the most exciting original motion picture of all time

KING KONG

5. Our records indicate that the response to our pre-release publicity for the film was enormous. Paramount received over 40,000 letters from people requesting the poster, which the ad said would be furnished free to anyone who asked for it. Paramount's advertising and promotional expenditures for the 1976 "KING KONG" release were, of course, substantial. Our records show that in the period beginning in 1976 in which the picture was being actively promoted and exhibited in theaters in the United States, Paramount spent over \$7 million

to make the public aware of the film and induce people to see it. Our advertising campaign heavily emphasized the picture of King Kong on top of the twin towers as shown in Exhibit C.

6. Since its release on December 17, 1976, our "KING KONG" remake has been exhibited in over 11,748 theaters in the United States and Canada and has generated receipts to Paramount of \$35 million. "KING KONG" was the major Paramount Christmas release for the year 1976 and opened in approximately 1,000 theaters in the United States and Canada. Between December 1976 and December 1982, we estimate that 25,821,596 million persons* have seen the film in motion picture theaters and, of course, this audience has been expanded in more recent years by virtue of the fact that the film has been shown on network television** and exhibited through the medium of pay television (including cable and subscription TV) and is now available for purchase or rental by the public in videocassette and videodisc form.

* The average ticket price was \$2.13.

** The film was shown on television as a two-day special on September 16-17, 1978; May 8-9, 1980 as well as on November 13, 1980 and March 27, 1983.

Paramount's King Kong Merchandising Activities

7. As I said earlier, Paramount was also granted the rights by Dino De Laurentiis Corp. and RKO General, Inc. to use the King Kong name and character as a trademark in conjunction with the advertising, licensing and sale of King Kong products and services. These are denoted as the "merchandising rights" in the agreement between Paramount and Dino De Laurentiis Corp. of May 20, 1976 and the actual grant of them to Paramount is covered by a separate agreement of April 14, 1976 (Exhibit B). During the period we were authorized to exploit these rights, which roughly corresponded with the release of "KING KONG" and ran through December 1979, Paramount entered into licenses with over 30 different companies in which we authorized the use of the King Kong name and character as trademarks for the advertising and sale of such products as games, toys, articles of apparel, film cartridges, ceramics, school supplies, wrist watches and dolls. Our Merchandising and Licensing Department has prepared a list of the companies which we licensed to advertise and sell these products under the King Kong trademark and this list, which is annexed hereto as Exhibit D, gives the dates during which each of these licenses was in effect.* I

* Paramount also entered into licensing agreements with several companies authorizing the use of the King Kong name and gorilla character for the promotion and sale of products "tied-in" with Paramount's release of the "KING KONG" motion picture. These arrangements are separate and apart from those listed on Exhibit D.

would add that, consistent with our obligation to Dino De Laurentiis Corp. and RKO General, Inc. under these two contracts, Paramount secured RKO's approval of these licenses and exercised control over the quality of the articles of merchandise actually produced and sold under them.

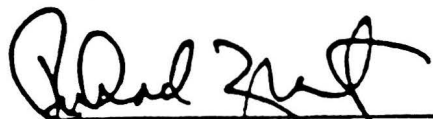
8. When these agreements expired, which in most cases occurred in the period between 1977 and the end of 1978, it is our understanding that all merchandising rights in the King Kong name and gorilla character reverted to Universal. I say "reverted" to Universal because I understand that Universal had by that time acquired the rights in the King Kong name and character that had previously been held and licensed to us (through Dino De Laurentiis Corp.) by RKO General, Inc. Our agreement of April 14, 1976 with RKO and Dino De Laurentiis Corp. (Exhibit B) explicitly provided for this in ¶ 7(b):

(b) Unless otherwise agreed to in writing by RKO, immediately following the expiration of the aforesaid period provided in the Picture Agreements, all Merchandising Rights shall revert to RKO who shall be free to license others in connection with such rights.

Paramount certainly accepted that when its own rights to use the King Kong name as a trademark expired by the terms of its agreements with Dino De Laurentiis Corp. and RKO General, Inc. any goodwill directly related to Paramount's King Kong merchandising projects was to inure to the benefit of RKO or whomever lawfully succeeded RKO. I say that I "understand" that this turned out to be Universal because I am generally

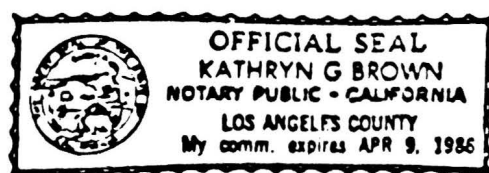
familiar with the circumstances by which Universal acquired these rights as a result of its lawsuit against RKO General, Inc. in federal court here in California in the mid-1970's and also because one of the consequences of that litigation was that Universal became entitled to additional shares in the royalties generated by Paramount's distribution of the "KING KONG" motion picture and licensing of King Kong merchandise.

9. Finally, I would add that when Paramount's rights to license the King Kong name and gorilla character for the sale of goods and services expired in 1980 we understood and accepted that Universal would be entitled to the goodwill that Paramount had generated in and for the merchandising of products using the King Kong name and character. We acknowledged Universal's right to in effect succeed Paramount as the licensing source for products and services sold under the King Kong name and character in November 1980 and I am annexing a copy of our letter to Universal embodying that acknowledgment as Exhibit E.


RICHARD ZIMBERT

Sworn to before me this
11th day of July , 1983


Notary Public



MCA

UNIVERSAL CITY STUDIOS, INC., 100 UNIVERSAL CITY PLAZA, UNIVERSAL CITY, CA. 91608. 213-985-4321

July 14, 1980

JUL 15 1980

Mr. Ralph Kamon
Paramount Pictures Corporation
5451 Marathon Street
Hollywood, California 90038

By STEVE ADLER

RE: "KING KONG"

Dear Ralph:

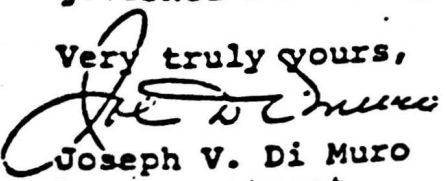
This refers to the Agreement of April 14, 1976 between Dino De Laurentiis Corporation, Paramount Pictures Corporation and RKO General, Inc. covering the grant to Paramount of merchandising rights in the name and character "KING KONG" in the United States and Canada.

It is our understanding that the aforementioned "KING KONG" merchandising rights granted to Paramount expired in December 1979 and that all "KING KONG" merchandising licenses granted by Paramount to third parties have likewise expired.

Under a final judgment entered by U.S. District Judge Real on March 21, 1979 on Richard Cooper's cross-complaint against RKO (in the declaratory relief action filed by Universal against RKO and others) Cooper was declared to be the sole and exclusive owner, among other things, of all merchandising rights "in and to the use of the name, character and story "KING KONG". Cooper in turn granted certain "KING KONG" rights to Universal, including motion picture rights and all of Cooper's rights to grant merchandising licenses relating to the name, character and story "KING KONG".

Universal intends to begin the exploitation of its "KING KONG" merchandising rights shortly and this letter is intended to inform Paramount of Universal's rights. Therefore, please be governed accordingly.

Very truly yours,


Joseph V. Di Muro
Law Department
JVD:ab

cc: Steve Adler
Walter Josiah
Steve Kroft
Lou Petrich

A001359

Paramount Pictures Corporation

NOV 20 1980
BY STEVE ADLER

November 18, 1980

Mr. Joseph V. Di Muro
Universal City Studios, Inc.
100 Universal City Plaza
Universal City, California 91608

Re: "KING KONG" -
Merchandising

Dear Mr. Di Muro:

I refer to your letter to Mr. Ralph Kamon dated July 14, 1980, in which you informed Paramount of Universal's intent to begin exploitation of "KING KONG" merchandising rights.

This is to confirm that Paramount's merchandising rights in connection with "KING KONG" have expired and to advise you that Paramount will no longer be exercising such merchandising rights. All "KING KONG" licenses granted to third parties have expired with the exception of one license to Ben Cooper, Inc., of New York, for the manufacture, distribution and sale of Halloween and masquerade costumes, masks and trick-or-treat bags, which will expire December 31, 1980.

Thank you for your advice in this matter.

Very truly yours,

Christopher Cosby
Contracts Administrator

CC/cb

cc: Steve Adler ✓
Hy Forman
Walter Josiah, Jr.
Ralph Kamon
Mark D. Lofstrom
File



5451 Marathon Street, Los Angeles, California 90038 (213) 468-5000

A001360

GW LEISURE TIME